HOW TO PREPARE AND PRESENT SUCCESSFUL APPLICATIONS TO THE COURT

Address to FNQLA 24 May 2013 Townsville
By The Honourable Justice Henry

1. BEFORE FILING

Is the application necessary?

Applications involve costs, even if they resolve.

Many applications resolve without argument.

Why? Reasons include:

- an ill informed party sees the materials filed and finally understands;
- a stubborn party sees the material filed and finally realises a loss looms;
- the looming hearing prompts the parties to confer and negotiate a resolution.

The underlying reason: a failure to effectively communicate with the opposing party before filing.

The lesson?...

Attempt to resolve the issue before filing

It costs less money.

Communicate clearly with your opponent:

- explain the issue;
- explain how it should be resolved;
- provide information in support of your explanations to demonstrate you are correct;
- set a reasonable deadline for response.

Letters and emails:

- dual purpose: persuasion and a potential exhibit if an application becomes necessary;
- remember the Court may see them;
- discourteous or aggressive correspondence provokes resistance not resolution;
- beware of the tendency towards unprofessional expression in emails;
- start a new email trail for a new topic:
  - it avoids confusion, and
  - avoids excessive length if printed.

Converse with your opponent:

- pick up the phone!
- have a meeting;
- place a follow up phone call;
- more persuasive than correspondence;
- you may learn something;
- file note the conversation.

UCPR 444 letter:

- if application for further and better particulars, directions, failure to comply with rule or order;
- content must comply with r 444.

Prospects?

Carefully consider whether the application has reasonable prospects of success.

Can you answer the arguments likely to be raised against the application?

If in doubt seek advice.

Is your own house in order?

Ensure the state of your own case is sufficiently in compliance with the rules before assailing your opponent's. For example see:

- *Flightship Ground Effect Pty Ltd v NQEA Australia Pty Ltd* Supreme Court 1607 of 2004 6/08/2012 – plaintiff had not served its list of documents.
- *Meredith v Newman & AAMI* [2012] QSC 136 – matter not ready for trial.

2. MATERIALS TO BE FILED

Application

In the approved form r 26(1), 31(2)

Set out the orders sought.

Take care in formulating the orders sought:

- the orders sought are the focus of the entire application;
- consider the purpose of the application;
- do the orders sought meet that purpose?
- do you have evidence supporting the orders sought?
- what is the legal foundation for the orders sought?
- state the rule or act and section under which the order is sought;
- if in doubt about the appropriate orders seek advice before filing, not after.

Affidavits

Evidence is ordinarily given by affidavit in an application - UCPR 390.

Contents of affidavit - UCPR 430:

> *"(1) Except if these rules provide otherwise, an affidavit must be confined to the evidence the person making it could give if giving evidence orally.*
> *(2) However, an affidavit for use in an application because of default or otherwise for relief, other than final relief, may contain statements based on information and belief if the person making it states the sources of the information and the grounds for the belief."*

Only include evidence that is relevant to the application.

Lengthy exhibits:

- avoid where practicable;
- the deponent does not need an exhibit to support each assertion of fact in the affidavit;
- only exhibit important and relevant documents;
- extracts rather than the entirety of lengthy documents may be exhibited, ensuring they are clearly identified as extracts;
- "the documents are to be presented in a way that will facilitate the Court's efficient and expeditious reference to them" - UCPR 435(10);
- index and paginate the exhibits - UCPR 435(11);
- preferably tab each exhibit.

3. PREPARATORY ISSUES

Time and timing

Give proper consideration to the time estimate for the application.

Gross overestimates and underestimates can have adverse consequences.

If the matter is lengthy:

- consult the Registry about suitable dates;
- consider seeking a first return date for directions on a hearing.

If the matter is urgent:

- consult the Registry or the Judge's Associate;
- the Court will ensure it is available, within reason.

If filing an affidavit the afternoon before the hearing, ensure Registry staff realise the matter is on the next day so they can add it to the file.

Consent orders by Registrar

The Registrar may make consent orders – UCPR 666

PD 4 of 2010 provides for the types of consent orders which may appropriately be given by a Registrar (eg matter deemed resolved, adjournment of application, awarding of costs) and the types which may more appropriately be made by a judge (eg expert evidence orders, an order that an application continue as a claim).

Appear by telephone, video link, telephone?

The Court may receive evidence or submissions by telephone or video link - UCPR 392.

Confirm your opponent has no objection – PD 1 of 2008.

Seek the Court's consent in advance, informing your opponent in doing so.

Setting aside cost considerations appearing in person is always preferable to appearing by telephone or video link because the advocate who is present in person:

- can more readily confer and negotiate outside the Court room;
- will likely be more persuasive;
- will more readily and reliably detect and interpret signals as to what the Judge is thinking in the course of argument.

Video link is preferable to telephone because it at least confers the added advantage of seeing and being seen.

Cross examination

A party wishing a deponent to attend the Court for cross examination must give notice to that effect if the affidavit is served more than one day before the hearing - UCPR 439(2).

However, where an affidavit if served less than two business days before the hearing an opponent must attend the Court to be available for cross examination unless otherwise agreed - UCPR 439(3).

Ex parte applications

Ex parte applications are an exception to the general requirement that an application must be filed and served at least three business days before the hearing date - UCPR27.

Some attempt at service, even if late, is better than no service at all. Similarly service which does not comply with the ordinary requirements of UCPR 112 is better than no service at all: see *Re Griffiths* [1991] 2 Qd R 29, 34.

In proceeding ex parte the applicant assumes a substantial burden:

> *"…it is the duty of a party asking for an injunction ex parte to bring under the notice of the Court all facts and materials to the determination of his right of that injunction, and it is no excuse for him to say he was not aware of their importance. Uberrima Fides is required, and the party inducing the Court to act in the absence of the other party, fails in his obligation unless he supplies the place of the absent party to the extent of bringing forward all the material facts which that party would presumably have brought forward in his defence for that application. Unless that is done, the implied condition upon which the Court acts in forming its judgment is unfulfilled and the orders so obtained must also invariably fail"* per Isaacs J in *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679, 681, 682.

The consequences of not complying with the higher obligations of an ex parte application can be costly to the client and put the professional standing of the practitioner at risk. See for example *Surefire Holdings Pty Ltd v Oxley Sports Drome Pty Ltd* [2001] QSC 85.

Timely provision of materials to the Judge

Bear in mind many Judges peruse materials the afternoon or evening before the application, or very early in the morning of the application:

- file your outline of argument or at least forward it to the Judge's Associate prior to the day of hearing;
- if an affidavit to be filed by leave is provided in advance to the Judge's Associate it is preferable to provide it in hard copy rather than email.

4. OUTLINES OF ARGUMENT

Procedural points

"Practitioners are to provide written outlines of argument in contested and ex parte hearing before a Judge or Registrar (including, where practicable, bail applications) in the applications jurisdiction" PD 6 of 2004.

Two copies are to be filed, so there is one copy for the Court's file and the Judge has a working copy to write on – PD 3 of 2008.

Cite cases correctly. For example, use square brackets around the year if the volume reference is governed by the year and round brackets if governed by a consecutive volume number.

Cite the official report publication of the case.

Format the outline clearly and simply.

References to filed documents should identify them by the Court file index document number.

An outline of argument should usually not exceed four pages – PD 6 of 2004 [2](c).

Appearance slips must be completed – PD 6 of 2004[6]

With the assumption of Auscript's responsibility for Court recording it is highly desirable that appearance slips be provided electronically by way of email to the Judge's Associate.

An opportunity for persuasion

The preparation of a written submission is critical to the success of an application:

- the Court has an expectation of being provided with a written outline;
- the discipline of preparing it focuses the applicant's mind on the best way to advance the application at hearing;
- it assists the Court as an ongoing point of reference to the critical issues of facts and law;
- even after argument is over it assists the Judge in reaching and articulating reasons;
- above all it is an instrument of persuasion.

File early so the Judge has an opportunity to read it before the hearing.

"Outlines should be exchanged as early as practicable prior to the hearing" – PD 6 of 2004.

It is forensically counterproductive and potentially unethical to refrain from disclosing your outline until the last moment in order to take your opponent by surprise:

- you lose the opportunity of the Judge reading the outline in advance of the hearing;
- parties are rarely surprised by any of the good arguments of their opponents;
- an early exchange of outlines may prompt the parties to narrow or resolve the issues.

Substantive content

"2. An outline should:
(a) provide a concise summary of the argument, in point form;
(b) identify relevant authorities and legislative provisions;
(c) usually not exceed four pages;
(d) attach a chronology where appropriate" - PD 6 of 2004.

The list of materials is commonly included as an opening paragraph in the outline of argument.

Be concise:

- it is an outline, not written submissions in full;
- lengthy written submissions will deter rather than assist a potentially busy applications Judge from getting to the point of the matter;
- reduce lengthy quotations to basic propositions;
- provide evidentiary and legal references so as to allow the Judge to easily pursue more detail if required;
- if a lengthy extract or analysis is vital consider annexing it rather than including it in the body of the outline.

Sequence:

- carefully consider the most logical and forceful sequence;
- use (not over-use) sub-headings to "headline";
- identify the major issue or issues in the application early;
- run your strongest argument first.

Facts:

- summary only;
- only include the facts which are critical to your argument or to addressing the likely argument of your opponent;
- chronologies are useful but if lengthy may detract from the flow of the outline (consider an annexure);
- be accurate – a reputation for misstating the facts is hard to shake.

Reference to authorities and statutes:

- clearly identify the legislative provision or rule relied upon;
- ensure the statute referred to is what it was at the time;
- only quote the relevant content of critical sections, otherwise summarise their effect;
- cite the most recent, highest authority;
- avoid padding with cases which merely follow or cite the important authority;
- citing cases unnecessarily wastes the Judge's time and distracts from the authorities which are critical to your application.

Orders sought:

- clearly identify the orders sought;
- explain how your argument supports those orders;
- annex a draft order.

Five sins:

"(1)*prolixity* – including irrelevancies, excessive quotation of fact or authority and failure to distil the essence of the argument.

(2) *issue overload* – too many issues or points; the failure to reject weak points; lack of selectivity.

(3) *incoherence* – lack of logical, unified concept or theme; no interrelated organisation.
(4) *inaccuracies* – misstatement of facts and issues; omitting or misquoting authorities; quoting out of context.
(5) *mechanical defects* – lack of index or adequate chronology; inaccurate references (authorities & transcript); typographic errors and poor grammar and spelling; failure to specify relief" (JL Glissan, *Advocacy in Practice,* 4th edition p 195).

5. AT COURT BEFORE THE HEARING

Seek out and consult with your opponent at Court:

- can the application be resolved?
- can the issues be narrowed?
- is there common ground as to how long the application will take?

If there is a mini call over:

- be there for it;
- do not be double booked elsewhere or expect to go to the back of the queue;
- spare the Court your substantial submissions, the Court just wants to know how long it will take or whether there is a consent order;
- be realistic with your time estimates;
- your estimate should allow time for questioning by the judge;
- gross under-estimates will invoke the ire of other lawyers competing to be heard and when they become apparent during the hearing the court may stand your matter down, shifting it to the end of the queue.

Announce your appearance slowly and clearly.

Absent parties:

- if one party is appearing for all seeking a consent order tender a letter or document proving the authority to act for all;
- if parties are otherwise absent ask the Court that their name be called three times (so the record will show the party was called and did not appear).

Reading materials:

- before oral submissions begin each party should "read" the filed materials on which they rely;
- abbreviate by reading "the materials listed in" the list handed up to the Court or included in an outline of argument handed up to the Court;
- the reading of materials assumes particular significance where the Court file is already lengthy and it is not obvious what materials are to be relied upon.

Taking objection:

- the proper time to take objection to the admissibility of the content of affidavits is before or when they are read;

- bear in mind the Judge may not have an adequate command of the case to determine admissibility at the outset;
- consider, if your position will not be prejudiced, taking the objection but not pressing for a ruling until the Judge knows more about the case;
- be discerning, only take the points that matter.

6. ORAL SUBMISSIONS

Preparation

Do not assume it will be sufficient to merely indicate that you rely on the contents of your written outline – that will not assist the Judge.

Your written outline identified the key issues, law facts and argument – now be prepared to elaborate on any and all of those things.

Do not let your outline serve as your notes for your oral submissions – prepare notes (not a script) containing the key points you want to ensure you make on your feet during argument.

Use tabs and highlighting of your brief to ensure you will have the critical information at your fingertips during oral submissions.

Assemble copies of authorities and important extracts from legislation to hand up during argument (if they have not already been annexed to your outline).

The copy of the case should be of the official report.

Tab, highlight or underline the key passages in the document you hand up so that you can take the Court to them quickly.

Execution

Remember your audience:

- do not assume the Judge is as intimately familiar with the outline and the materials as you are;
- the probability is that the Judge will have read the outlines and be alive to the basic issues in the case but may not have grasped the minutiae;
- give the Judge time to finish making a note;
- clearly identify the filed document you are referring to by its Court file number and the relevant page;
- give the Judge time to find the passage you are referring to;
- if the Judge asks a question answer it rather than say you will come to it later;
- remember you can answer the Judge's question and still come back to develop your answer more thoroughly later after you have laid further ground work;
- watch the Judge.

"It is vital that advocates should watch those to whom they are addressing their arguments. In this way, they will be more likely to follow the tendencies of thought which may be expressed as much by body language and attitude as by oral expression. How many advocates I have seen clutching the podium as a support, lost in their books and in their reading ignoring the very people who's decision is vital to their clients cause?...Watching the decision-makers' reactions to arguments can help the advocate know how far to push an issue and when enough has been said" :Kirby P, *Ten Rules of Appellate Advocacy* (1995) 69 ALJ 964, 971-2.

Indexing and headlining:

- at the outset tell the Judge the key issues you intend to address;
- as your oral submissions progress and you move to an new issue "headline" that moment by indicating that you are moving to the new issue and reminding the Judge of what it is.

Anticipate and address your opponent's argument:

- do not fear addressing your opponent arguments before your opponent does;
- it is more effective to deal with your opponent's strongest argument before your opponent does, rather than waiting for your reply;
- the Judge will also have an expectation that you address your opponent's main points.

Take the Court to your draft order.

Costs

Remember to seek costs.

"The costs of a proceeding do not include the costs of an application in the proceeding, unless the Court orders otherwise" – UCPR 693(1)

"If the court reserves costs of an application in a proceeding, the costs that are reserved follow the event unless the Court orders otherwise" – UCPR 698

Where offers bearing upon costs have been made (see, eg, *Greenhalgh v Bacas Training Ltd & Ors* [2007] QCA 365) have the relevant materials ready to place before the Court if necessary.

Henry J
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